

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 07-398V

July 13, 2007

Not to be Published

RODNEY ALLEN TRAYLOR,

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Petitioner,

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v.

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Entitlement; no subject matter
jurisdiction for smallpox vaccine
injury claim; no fees or costs

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SECRETARY OF THE DEPARTMENT OF
HEALTH AND HUMAN SERVICES,

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Respondent.

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Elaine Whitfield Sharp, Marblehead, MA, for petitioner.

Mark Curtis Raby, Washington, DC, for respondent.

MILLMAN, Special Master

DECISION¹

¹ Because this unpublished decision contains a reasoned explanation for the special master's action in this case, the special master intends to post this unpublished decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). Vaccine Rule 18(b) states that all decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would clearly be an unwarranted invasion of privacy. When such a decision or designated substantive order is filed, petitioner has 14 days to identify and move to delete such information prior to the document's disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall delete such material from public access.

Petitioner filed a petition on June 19, 2007, under the National Childhood Vaccine Injury Act, 42 U.S.C. §300aa-10 et seq., alleging that smallpox vaccine caused him injury, to wit, pericarditis/myocarditis.

On July 13, 2007, respondent filed a Motion to Dismiss because smallpox vaccine is not one of the listed vaccines on the Vaccine Injury Table concerning which petitions may be brought. 42 C.F.R. §100.3(a). Therefore, the undersigned has no subject matter jurisdiction over this case.

FACTS

Petitioner received smallpox vaccine on June 22, 2004. Med. recs. at Ex. 1, p. 2. He was diagnosed with smallpox vaccine-associated pericarditis on July 5, 2004. Med. recs. at Ex. 2, p. 6.

DISCUSSION

The United States is sovereign and no one may sue it without the sovereign's waiver of immunity. United States v. Sherwood, 312 U.S. 584, 586 (1941). When Congress waives sovereign immunity, courts strictly construe that waiver. Library of Congress v. Shaw, 478 U.S. 310 (1986); Edgar v. Secretary of HHS, 29 Fed. Cl. 339, 345 (1993); McGowan v. Secretary of HHS, 31 Fed. Cl. 734, 740 (1994); Patton v. Secretary of HHS, 28 Fed. Cl. 532, 535 (1993); Jessup v. Secretary of HHS, 26 Cl. Ct. 350, 352-53 (1992) (implied expansion of waiver of sovereign immunity was beyond the authority of the court). A court may not expand on the waiver of sovereign immunity explicitly stated in the statute. Broughton Lumber Co. v. Yeutter, 939 F.2d 1547, 1550 (Fed. Cir. 1991).

The Vaccine Program permits suit for listed vaccines and smallpox is not one of those listed vaccines. The undersigned must dismiss this case for lack of subject matter jurisdiction.

Since the undersigned does not have subject matter jurisdiction over the case, petitioner may not receive attorney's fees and costs. Martin v. Secretary of HHS, 62 F.3d 1403 (Fed. Cir. 1995), in which the Federal Circuit affirmed the denial of attorneys' fees and costs in a dismissed vaccine case, stating that the Vaccine Act did not create an independent grant of jurisdiction for the awarding of fees in vaccine cases. 62 F.3d at 1405. The Martins were barred from filing a petition because they had a pending civil action, in violation of § 300aa-11(a)(6) which specifically barred their filing a petition.

CONCLUSION

Respondent's motion to dismiss is granted. This petition is dismissed. Petitioner may not receive attorney's fees and costs. In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court is directed to enter judgment in accordance herewith.²

IT IS SO ORDERED.

July 13, 2007
DATE

s/Laura D. Millman
Laura D. Millman
Special Master

² Pursuant to Vaccine Rule 11(a), entry of judgment can be expedited by each party's filing a notice renouncing the right to seek review.